United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: September 30, 1997

Case No. 95 INA 673

In the Matter of:

META HILL,
Employer

on behalf of

JOANNA WOJCIK
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Joanna Wojcik (Alien) by Meta Hill (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for permanent full time employment of the Alien as a Kosher Household Cook with the following duties:

> Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week with no overtime anticipated. The hours were to be from 8:00 a.m. to 5:00 p.m., at the rate of $12.81 per hour. The Employer added the following statement to the ETA 750A:

> Please be advised that I have an opening for a position of Cook Kosher Live-Out in my household. I am a senior citizen and I need meals prepared with low fat and low cholesterol contents. I am not able to prepare the proper meals on a regular basis and prepare the necessary foodstuff. At the present time I do not employ any U.S. workers. The cleaning duties are prepared by an hourly worker who comes to my house once a week. The cooking is done at the present time by my relative who cannot continue doing this because of personal reasons.

The Alien represented in the form ETA 750B that she was currently in the United States on a B-2 Visa, had worked as a Kosher Cook for a family in the United States for a period of seven years,

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

and was currently self-employed as a Kosher caterer.

Notice of Findings. The CO then issued a Notice of Findings stating that, subject to the Employer's rebuttal, the application would be denied on grounds that the duties described in the ETA 750A it did not appear to constitute the full-time position required by 20 CFR § 656.3. The CO advised the Employer that she could rebut this finding by amending the job duties or by submitting evidence that the position constitutes full time employment and has been customarily required by the Employer. The CO directed the Employer to file the following as documentary evidence:

> State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.
>
> If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.
>
> Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.
>
> Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that a "relative" has been performing these duties, you must supply evidence to support that this "relative" was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this "relative" started performing these duties.
>
> Who will perform the general household maintenance duties, such as cleaning, laundry, vacuuming, etc.? If it is your position that the cleaning duties are performed by an "hourly worker who comes" to the house "once a week", you must supply evidence to support, i.e., bills and canceled checks for the last 12 months.
>
> Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has

required.

The CO also requested evidence as how the Employer provides for the care of any pre-school or school age children in the household while the parents were absent from the home.

Rebuttal. In her rebuttal the Employer said she had not previously employed a full time cook but, she said, due to the advanced age of her husband, who was 80 years old, and her own age, 75 years, they cannot provide nutritious meals for themselves, and they have been "forced to seek professional help." She stated further that her daughter, who had been helping with the cooking on a temporary and unpaid basis, could not continue to do so any longer.

The Employer noted her need to be served Kosher food, saying that the preparation of Kosher foods is more time consuming than other cuisines because of the necessity for keeping dairy and meat products separate, adding that the shopping for Kosher meats also takes more time. She presented a proposed schedule for the Alien that encompassed the preparation and serving of food five times a day. Beginning with breakfast at 8:30 a.m., the cook would serve a midmorning snack at 10:00 a.m.; lunch at noon that consisted of soup, a main course with choice of salmon loaf, fried herring, matzo balls, kreplach or stuffed cabbage; a mid-afternoon meal at 3:15 p.m., that provided a choice of stuffed pastries, knishes, potato croquettes, apple pancakes; and at 4:30 p.m., dinner, consisting of appetizers followed by a main course such as klops, meatballs with potatoes, pot roast, and a salad and dessert. The Employer and her husband would be joined by their two grandchildren for the afternoon meal and by their daughter and the grandchildren and at dinner.

The Employer explained that the cook would not be required to perform duties other than cooking and work related to cooking, and that her daughter and grandchildren performed the cleaning and other household maintenance on weekends. This was explained by a statement from the Employer’s daughter, who said she had been required to help her mother with household chores and cooking in the past "due to her [mother's] nerve condition in her hands and legs." Employer attached a statement by Dr. George Jay Frankel, who reported that the Employer has severe bilateral peripheral neuropathy, and that she requires someone to do the cooking for her because she is unable to do work that requires her to remain standing or to perform work with her hands for any length of time.

Final Determination. In the Final Determination the CO denied Employer’s application for certification on grounds that the Employer had failed to sustain her burden of proof under 20 CFR § 656. The CO said it did not appear that the work described in the Employer’s rebuttal would require eight hours per day or

forty hours per week. The CO then expressed suspicion that the Employer had created the position of Cook "solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category."

Appeal. The Employer requested administrative review of the denial of her application,of the denial of her application, and the file was referred to the Board.

DISCUSSION

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of $12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties beause it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer has not offered full time employment.

On the other hand, the NOF did raise an unresolved issue as to whether or not the position description requirement of two years of specialized cooking experience in the duties of a Kosher cook. The effect of this job requirement is to eliminate a U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty

hour week with the issue of the business necessity of a restrictive job requirement, the Final Determination cannot be construed as having determined this issue after weigh-ing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking Kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b)(2)(i)(B). In the event that the CO finds that the requirement of experience in Kosher cooking is unduly restrictive, the Employer will be required to prove that the hiring of a Cook (Household)(Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of experience in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this application for alien labor certification is remanded to the Certifying Officer for the reasons hereinabove set forth.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 673

META HILL, Employer
JOANNA WOJCIK, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

This has been redrafted to meet your comments and is again submitted for the panel's consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: September 8, 1997